IN THE COURT OF APPEALS OF IOWA

No. 4-425 / 93-1514

FILED
JAN 23 1995
CLERK SUPREME COURT

KABE'S RESTAURANT, LTD.,
Plaintiff-Appellant,

vs.

RICHARD D. KINTNER,
Defendant-Appellee.

RICHARD D. KINTNER,
Plaintiff/Cross-Appellant,

vs.

JOHN F. HALL,
Defendant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Harry Perkins, Judge.

Appeal and cross-appeal from claims of breach of fiduciary duty, conversion and tortious interference with employment contract. **AFFIRMED IN PART, REVERSED IN PART.**

Michael J. Burdette of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant Kabe's and cross-appellee Hall.

Randall H. Stefani and Michael J. Eason of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, for appellee.

Heard by Donielson, C.J., and Habhab and Cady, JJ.

DONIELSON, C.J.

Plaintiff, Kabe's Restaurant, Ltd. ("Kabe's"), appeals the trial court's denial of its motions for judgment notwithstanding the verdict and for a new trial. Defendant Richard Kintner appeals from the trial court's grant of judgment notwithstanding the verdict with respect to his counterclaim against John Hall. We find there was not substantial evidence to support the claim for breach of a permanent employment contract and Kabe's motion for judgment notwithstanding the verdict should have been granted. We find no abuse of discretion with respect to the denial of Kabe's request for a new trial on the issues of breach of fiduciary duty and conversion, and we affirm the grant of judgment notwithstanding the verdict on Kintner's claim against John Hall for tortious interference with his employment relationship.

I. BACKGROUND

Kabe's was incorporated on March 28, 1984. Kintner was originally the major shareholder and was employed to oversee management of the corporation's restaurant and motel. Problems arose regarding Kintner's management, and his employment was terminated effective July 28, 1991.

In August 1992, Kabe's filed a petition against Kintner for breach of fiduciary duty, conversion, and fraud. Kintner filed a counterclaim alleging the termination of his employment constituted a breach of a

contract for permanent employment. Kintner also filed a petition against one of Kabe's directors, John Hall, alleging tortious interference with Kintner's employment contract. This action was consolidated with Kintner's counterclaim against Kabe's.

Following trial, the jury returned a verdict in favor of Kintner on all claims. Kintner was awarded $77,595 in compensatory damages from Kabe's and Hall and $50,000 in punitive damages from Hall. Kabe's and Hall filed a joint motion for new trial and separate motions for judgment notwithstanding the verdict. The district court denied the motion for new trial and Kabe's motion for judgment notwithstanding the verdict. It granted Hall's motion for judgment notwithstanding the verdict. Kabe's appealed and Kintner cross-appealed.

II. KABE'S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

In reviewing a ruling on a motion for judgment notwithstanding the verdict "[t]he question is whether evidence, taken in the light most favorable to the party resisting the motion, regardless whether the evidence was contradicted, and taking every legitimate inference that might be fairly or reasonably deducted therefrom, showed that the movant was entitled to a directed verdict at the close of all the evidence." Suss v. Schammel, 375 N.W.2d 252, 255 (Iowa 1985). A judgment notwithstanding the verdict is appropriate if there is no substantial evidence

in support of one of the elements of a plaintiff's claim. Dennett v. City of Des Moines, 347 N.W.2d 691, 692 (Iowa App. 1984).

We find Kabe's was entitled to judgment notwithstanding the verdict with respect to the issue of the existence of a permanent employment contract. Kintner failed to meet his evidentiary burden of establishing the existence of a permanent employment contract to which Kabe's was legally bound. Kintner asserts the original board of directors intended and understood he would be employed by Kabe's until his retirement. However, Kintner had no written contract with Kabe's which provided for his permanent employment, nor had the corporation adopted a resolution approving such employment. In 1987 Kintner presented a proposed written employment contract to the board which would have provided for a five-year employment term. The board never acted on Kintner's proposed contract.

The corporation had the power to make contracts. Iowa Code § 496A.4(8) (1983). All corporate powers were to be exercised by, or under the authority of, its board of directors. See Iowa Code § 496A.34 (1983). Article V, section 1 of Kabe's bylaws allows the board to authorize any officer or agent to enter into contracts on behalf of the corporation. No corporate minutes or resolutions were introduced which indicated the corporation had in fact

authorized an officer or agent to enter into an employment contract on behalf of the corporation.

Kintner relies on Rodgers v. Baughman, 342 N.W.2d 801, 807 (Iowa 1983), in arguing contracts executed on behalf of a close corporation will bind the corporation despite noncompliance with statutory formalities. Rodgers is distinguishable in that it involved a written contract which had been executed on behalf of the corporation's majority shareholders, directors and officers. Neither the existence nor terms of the contract were at issue in Rodgers. Instead, the only question was the presence of actual or apparent authority to bind the corporation.

In the case at hand, Kintner had the burden of proving the existence of an oral contract for permanent employment. A permanent employment contract will be upheld only where the intention that the contract's duration is permanent or for life is clearly expressed in unequivocal terms. Thompson v. Miller, 251 Iowa 324, 327, 100 N.W.2d 410, 412 (1960). Kintner testified as to his expectation he would be employed by Kabe's until his retirement. Original board members similarly testified as to their assumption Kintner would be employed by Kabe's until he retired or the business was sold. When asked if he had ever specifically discussed with the original board of directors his intent to remain with the business until his retirement, Kintner admitted there had been no specific discussions.

The testimony of the original directors indicated they believed Kintner, as the major shareholder, would be employed by the corporation for as long as he wanted to be employed. However, none of the original directors testified as to the existence of contract negotiations or the duration and terms of a purported lifetime contract for Kintner. Substantial evidence did not support Kintner's claim of a permanent employment contract and Kabe's was entitled to judgment notwithstanding the verdict. We reverse the trial court's entry of a judgment on this claim.

III. KABE'S MOTION FOR NEW TRIAL

Kabe's has appealed the denial of its motion for a new trial. It claims the jury's verdict denying its claims of breach of fiduciary duty and conversion was not supported by sufficient evidence, was inadequate with respect to damages and appeared to have been influenced by passion or prejudice. In ruling upon a motion for a new trial, a district court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). A trial court's discretion in granting or refusing a new trial will not ordinarily be disturbed on appeal unless an abuse of discretion is shown. See Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974).

Kabe's introduced considerable evidence in support of its allegations of breach of fiduciary duty and conversion. Kintner responded by explaining much of his disputed conduct was consistent with the duties and responsibilities of a manager in the hospitality industry. Kintner argued some of his disputed acts had been ratified by the board of directors. While he did not have complete records to respond to some of the conversion claims, Kintner testified he had reimbursed the corporation for funds used for personal use and the jury apparently found this testimony credible.

A trial judge is not to set aside a verdict merely because he or she would have reached a different conclusion than the jury. See Lappe v. Blocker, 220 N.W.2d 570, 573 (Iowa 1974). Likewise, we cannot reverse the denial of a new trial merely because we might have reached a different determination than the jury. Jury instruction number ten instructed the jury on the elements of a breach of fiduciary duty. It is apparent the jury found Kintner acted prudently, in good faith and in a manner he believed to be in the best interests of the corporation. There was also evidence from which the jury may have found the corporation had ratified Kintner's acts. The jury found Kintner credible and accepted his explanations for his conduct. Under these circumstances we can find no abuse of discretion in the denial of Kabe's motion for a new trial.

IV. HALL'S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Kintner claims the trial court erred in granting Hall's motion for judgment notwithstanding the verdict. Hall was a major shareholder, officer and director of Kabe's. Kintner claimed Hall had tortiously interfered with his employment contract.[1] The trial court concluded Hall's actions had been taken in good faith and in the performance of his duty as an officer and director.

On appeal Kintner asserts a jury question existed on the issue of whether Hall acted within the scope of his qualified privilege when he called a special board meeting at which Kintner's job performance was examined and his employment terminated. A qualified privilege extends to Hall's actions if he did not employ improper means and he acted in good faith to protect the interests of the corporation. See Bossuyt v. Osage Farmers Nat'l Bank, 360 N.W.2d 769, 778-779 (Iowa 1985).

Various factors are relevant in determining whether an actor's conduct was "improper" and outside the scope of this qualified privilege. Hunter v. Board of Trustees, 481 N.W.2d 510, 518 (Iowa 1992). Hall had a fiduciary duty to the corporation. With regard to Kintner's termination

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1. Even though we have held the evidence was insufficient to establish the existence of a permanent employment contract, Iowa law provides a contract for employment at will can also be the subject of tortious interference. Toney v. Casey's General Stores, Inc., 372 N.W.2d 220, 222 (Iowa 1985).

there is no evidence to indicate Hall was acting in anything other than good faith and in the interests of the corporation. Prior tension or disagreements between Hall and Kintner did not give rise to an inference of ill-will or spite. Likewise, there was no evidence Hall used any improper means in connection with Kintner's termination.

There was not substantial evidence to show Hall's conduct exceeded the qualified privilege to which corporate officers and directors are entitled. The trial court properly sustained Hall's motion for judgment notwithstanding the verdict.

AFFIRMED IN PART, REVERSED IN PART.